

**STATE BOARD OF EQUALIZATION**

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September 23, 1991

Mr. S--- C---
S---
XXXX --- Lane
---, California XXXXX

RE: SR – XX-XXXXXX

Dear Mr. C---:

Senior Tax Representative Curtis W. Stapp has requested that the Legal Division respond to your letter to him of August 10, 19XX. Your letter has been assigned to me. You have requested a ruling that sales tax does not apply to certain of your sales. We note that the Board staff cannot issue tax rulings; only the Board itself may do that. However, we can give you our opinion regarding the correct application of tax to a hypothetical set of facts.

In your letter, you stated that you were intending to market a product called “Monjay” beginning in September. We assume that you have gone ahead and begun selling this product. You describe it as follows:

“ ‘Monjay’ is dry yeast. ... Our packaging materials claim that when consumed in combination with garlic and onions ‘Monjay’ prevents halitosis.”

You attached to your letter a copy (apparently) of a Monjay package label. The label makes these claims for the product: “Prevents Garlic/Onion Breath & Aftertaste”; “Reduces Gas-Related Intestinal Discomfort.”

OPINION**A. Sales and Use Tax Generally**

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) “[I]t

shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 (290 P.2d 201.) "The taxpayer has the burden of showing that he clearly comes within the exemption." Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Food Products Exemption

Revenue and Taxation Code Section 6359, interpreted and implemented by Regulations 1602 and 1603, provides an exemption from sales and use taxes for the sales of food products for human consumption under certain circumstances. Subdivisions (1) & (2) of Regulation 1602(a) contain a list of products which, either singly or in combination, are considered "food products". Regulation 1602(a)(5), however, excludes certain items from the definition of "food products" as follows:

"(5) 'Food products do not include any product for human consumption in liquid, powdered, granular, tablet, capsule, lozenge, or pill form (A) which is described on its package or label as a food supplement, food adjunct, dietary supplement, or dietary adjunct, and to any such product (B) which is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally one or more of the following areas of human nutrition:

1. Vitamins
2. Proteins
3. Minerals
4. Caloric intake"

Regulation 1602(a)(5), subsequently, however, restricts the limitation on the definition of "food products" as follows:

"Tax, however, does not apply to any such products which either are exempted by Section 6369, respecting prescription medicines, or are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and foods providing adequate caloric intake. An example of the latter is a food daily requirement providing the user with the following:

1. 70 grams of high quality protein
2. 900 calories
3. Minimum daily requirements as established by the Federal Food and Drug Administration of the following vitamins: A, B1, C, D, Riboflavin, and Niacin or Niacinamide; the following minerals: Calcium, Phosphorus, Iron and Iodine.”

In interpreting and implementing the broad provisions of Section 6359(c), Regulation 1602(a)(5) sets up a two-step analysis. The threshold question is whether or not the food product under discussion is in one of the enumerated forms – liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then its sales are taxable if one of the two following conditions also occurs: (A) its label or package describes it as a food supplement, food adjunct, dietary supplement, or dietary adjunct; or (B) it is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally the intake of vitamins, protein, minerals, or calories. The subsequent references to “such products” in that subsection refer to products which occur in one of the enumerated forms, not products for which the claims prescribed in subsections (A) and (B) are made.

Based on the above standard, we conclude as follows:

We have previously concluded that where dry yeast is sold as a dietary supplement, or adjunct, or where the label makes specific medicinal claims, the product does not qualify under the above authority as a “food product.” As you note in your letter, the packaging for Monjay claims that the product prevents halitosis and also reduces gas pains. Because Monjay makes these specific medicinal claims, it is considered a “dietary supplement or adjunct” under Regulation 1602(a)(5) with the result that sales of Monjay are subject to tax.

For your information, I have enclosed a copy of Regulation 1602. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

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Enclosure: Regulation 1602